A.F.R.

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR

DIVISION BENCH : HON'BLE SRI S.R. NAYAK, CJ
& HON'BLE SRI S.K. AGNIHOTRI, J.

WRIT PETITION NO. 1993 OF 2005

WRIT PETITION NO. 1797 OF 2005

ORDER FOR CONSIDERATION

Sd/-
Chief Justice

HON'BLE SRI SATISH K. AGNIHOTRI, J

Sd/-
Satish K. Agnihotri
Judge

Post for: 21st December 2005

Sd/-
Chief Justice

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WRIT PETITION NO. 1993 OF 2005

PETITIONERS

1. Smt. Kumari Bai, wife of Shri Kailash Prasad Mahto, aged about 55 years.
2. Hariprasad Mahto, son of Shri Kailash Prasad Mahto, aged about 33 years

Both residents of Anand Nagar, Raipur

Versus

RESPONDENTS

1. State of Chhattisgarh, through the Secretary, Ministry of Law and Legislative Affairs, Mantralaya, D.K.S. Bhawan, Raipur (C.G.)
2. Raipur Municipal Corporation, a body corporate constituted under the relevant provisions of C.G. Municipal Corporation Act, through the Commissioner, Municipal Corporation, Malviya Road, Raipur

And

WRIT PETITION NO. 1797 OF 2005

PETITIONERS

1. Hariprasad Mahto, son of Shri Kailash Prasad Mahto, aged about 33 years, resident of Anand Nagar, Raipur
2. Manish Kumar Bhatia, son of Shri Jagdish Prasad Bhatia, aged about 33 years, resident of M.G. Road, Raipur

Versus

RESPONDENTS

1. State of Chhattisgarh, through the Secretary, Ministry of Law and Legislative Affairs, Mantralaya, D.K.S. Bhawan, Raipur (C.G.)
2. Raipur Municipal Corporation, a body corporate constituted under the relevant provisions of C.G. Municipal Corporation Act, through the Commissioner, Municipal Corporation, Malviya Road, Raipur

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Present: Mr. B.P. Sharma, learned counsel for the petitioner.

Mr. VVS Murthy, learned Dy. A.G., with Mr. Sumesh Bajaj, learned Dy. Govt. Adv., for the State.

Mr. H.B. Agrawal, learned Sr. Adv., with Ms. Sangeeta Mishra, learned counsel for respondent No.2

O R D E R

(Passed on 21st December 2005)

The following order of the Court was passed by **S.R. Nayak, CJ**

In these writ petitions the constitutional validity of Section 401 of Chhattisgarh Municipal Corporation Act, 1956 (*for short 'the Act'*) has been questioned so far it takes away the right of an aggrieved person of approaching the Court of law by filing Civil Suit of appropriate nature to obtain immediate and urgent relief without serving the statutory notice as required under sub-section (1) of that Section.

(2) The facts of the case leading to filing of these writ petitions be noted in the first instance and they, in brief, are as follows:

In Writ Petition No.1797 of 2005 the petitioners are the owners of a roof of a building situate at M.G. Road, Raipur having acquired the same under a sale-deed dated 24/05/2000. After purchasing the said property, the petitioners have raised further construction over the said roof. When the matter stood thus, they were served with a notice dated 06/09/2003 alleging that the construction of the first floor made by them is not legal and in violation of the approved plan, therefore, the same should be demolished within three days from the date of notice. The petitioners apprehending that the Corporation might demolish the construction filed a civil Suit on 15/10/2004 before the Court of First Civil Judge, Class-I, Raipur along with an application for grant of injunction. After service of summons, the Municipal Corporation on 17/03/2005 made an application

under Order 7 Rule 11 of the Code of Civil Procedure contending that the Suit is not maintainable for non-compliance of statutory provisions of Section 401 of the Act inasmuch as the suit was filed without giving statutory notice of one month to the Corporation and therefore the Suit should be dismissed. The Civil Court allowed the said application and dismissed the Suit. At that stage, the petitioners filed the writ petition.

(3) In Writ Petition No.1993 of 2005 the petitioners are the owners of a land bearing Plot No.2/8 admeasuring 805 sq. ft. situate at Maudhapara, Jawahar Nagar Ward, Raipur having purchased the same under a registered sale-deed (Annexure-P/2). It is stated that having obtained required permission from the Municipal Corporation, Raipur, they have made constructions in the said plot. On 14/10/2004 the officers of the Municipal Corporation, Raipur visited the property of the petitioners and threatened them that they would demolish their construction, if not removed by the petitioners themselves, for alleged violation of the byelaws and sanctioned plan. The petitioners apprehending that the Municipal Corporation would demolish the construction filed a Suit before the Civil Court along with an application for grant of injunction. The petitioners also filed an application for permission to file the Suit without service of notice on the Municipal Corporation as required under Section 401 of the Act. The Municipal Corporation on service of summons entered appearance and raised an objection that the civil Suit instituted by the petitioners is not maintainable for noncompliance of the mandatory provisions of Section 401 of the Act inasmuch as the Suit was instituted without service of notice on the Municipal Corporation. The Civil Court allowed the application filed by the Municipal Corporation and dismissed the suit. At

that stage, the petitioners filed Writ Petition No.1993 of 2005 praying for the same reliefs as prayed for by the petitioners in Writ Petition No.1797 of 1993.

(4) The reliefs sought in Writ Petition No.1797 of 2005 read as follows:

"7.1 A writ and / or an order in the nature of writ of certiorari or any other appropriate writ do issue declaring Section 401 of C.G. Municipal Corporation Act, 1956 as illegal, unconstitutional i.e. ultra-vires to the Constitution of India, so far it takes away the right of a citizen of approaching the Court of law by filing civil suit of appropriate nature to obtain immediate and urgent relief without serving the statutory notice of one month.

7.2 A writ and / or an order in the nature of writ of certiorari do issue quashing the impugned order passed by the court of 1st Civil Judge Class-I, Raipur passed in Civil Suit No.403-A/2004 between Hariprasad Mahto & another Vs. Municipal Corporation, Raipur dated 27.4.2005 dismissing the suit of the petitioners herein as premature on the ground of non-service of the statutory before institution of the suit as required under Section 401 of the Act.

7.3 A writ and / or an order in the nature of writ of prohibition do issue restraining the respondent Authorities, their agents, servants and employees from interfering/intermeddling with the possession of the petitioners or demolishing the construction raised by the petitioners.

7.4 Cost of the petition may also be granted.

7.5 Any other relief which this Hon'ble court may deem fit in the facts and circumstances of the case."

(5) In Writ Petition No.1993 of 2005 also similar reliefs are sought.

(6) The writ petitions were contested both by the State of Chhattisgarh and Municipal Corporation, Raipur by filing the replies/statements of objections. The State of Chhattisgarh filed statement of objections in Writ Petition No.1234 of 2005 wherein also the constitutional validity of Section 401 of the Act was questioned and in these writ petitions the State of Chhattisgarh has filed necessary applications praying the Court to adopt and treat the statement of objections filed by it in Writ Petition No.1234 of 2005 as the statement of objections/replies in these writ petitions also. Writ Petition No.1234 of 2005 was not pressed for decision-making by the learned counsel for the petitioner and the same was dismissed as not pressed by our separate order dated 06/12/2005.

(7) We have heard Mr. B.P. Sharma, learned counsel for the petitioners, Mr. VVS Murthy, learned Dy. Advocate General for the State of Chhattisgarh and Mr. H.B. Agrawal, learned Sr. Advocate for the Municipal Corporation, Raipur.

(8) Mr. B.P. Sharma, learned counsel for the petitioners would contend that right to file a civil suit is a basic right and that right cannot be limited by prescribing a condition that suit should be filed only after service of notice of one month on the Municipal Corporation, the Mayor-in-Council or any other officer or servant or any person acting under the Municipal Corporation in respect of any act done or purporting to have been done in pursuance of execution or intended execution. Mr. Sharma would,

therefore, contend that Section 401 of the Act insofar as it places the above obligation on a plaintiff before institution of the suit is *ex facie* arbitrary, unreasonable and violative of Article 14 of the Constitution of India and therefore that part of Section 401 of the Act is required to be declared as unconstitutional. Mr. B.P. Sharma further contended that whereas Sub-section (2) of Section 80 of the Code of Civil Procedure provides for institution of a suit with leave of the Court without serving notice as required by Sub-section (1) thereof where the party requires an urgent or immediate relief against the Government and other authorities, similar provision is not incorporated in Section 401 of the Act and therefore the impugned provision is arbitrary as well as discriminatory. Mr. Sharma further contended that Sub-section (3) of Section 319 of the Madhya Pradesh Municipalities Act, 1961 enacts special provision for institution of the suit under Section 54 of the Specific Relief Act, 1877 exempting such institution from embargo contained in Sub-section (1) of Section 319 of the said Act which prohibits institution of the suit against any Council or any Councillor, officer or servant thereof or any person acting under the direction of any such Council, Councillor, officer or servant for anything done or purporting to be done under the said Act, until the expiration of two months next after a notice, in writing, stating the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims, has been, in the case of a Council delivered of left at its office, and, in the case of any such member, officer, servant or person as aforesaid, delivered to him or usual place of abode, but similar provision is not enacted in Section 401 of the Act. It was submitted by Mr. Sharma that one set of citizens who reside within the Municipality may file suit for injunction without serving the notice and another set of citizens

who reside in the Municipal Corporation area cannot file a suit for permanent injunction before a civil Court without serving notice. According to Mr. Sharma that difference between two provisions tantamounts to an invidious discrimination violating Article 14 of the Constitution of India. Mr. Sharma further placing reliance on the maxim ***ubi jus ibi remedium*** would contend that though right to property is no longer a fundamental right still it is a constitutional right guaranteed and protected under Article 300-A of the Constitution and, therefore, a citizen should have a legal remedy to protect his property against the wrong action of the State and State authorities, instrumentalities of the State and other authorities by seeking appropriate legal remedies before the Civil Court and that no limitation on that right to seek legal remedy could validly be imposed by prescribing that no suit shall be instituted against the Corporation until the expiration of one month next after notice in writing has been served on the Corporation and since that prescription violates the rights of the citizen under Article 300-A of the Constitution, the impugned provision is liable to be condemned as unconstitutional. Mr. Sharma in support of his submission cited judgments of the Supreme Court in **Smt. Ganga Bai Vs. Vijay Kumar And others**[1], **Salem Advocate Bar Association, Tamil Nadu Vs. Union of India**[2]; **Mardia Chemicals Ltd. And others Vs. Union of India And others**[3]; **and Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation And others**[4].

(9) Mr. V.V.S. Murthy, learned Dy. Advocate General, would contend that since the power of the legislature to enact the Municipal

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1. (1974) 2 SCC 393 2. AIR 2005 SC 3353
3. (2004) 4 SCC 311 4. (1993) 2 SCC 279

Corporation Act is not disputed, the only thing to be seen is whether in enacting the impugned provision the Legislature has violated any of the provisions of Part-III of the Constitution or other provisions of the Constitution. Mr. Murthy would contend that simply because one cannot file a suit without serving notice on the authorities as prescribed under Section 401 of the Act, it cannot be said that in urgent situation the parties are left with no legal remedies. It was submitted by Mr. Murthy that in urgent situation where a party seeks urgent interim order to protect his property or person, he can approach the High Court under Article 226 of the Constitution of India for relief because the power of the High Court under Article 226 of the Constitution of India is always available to the aggrieved persons and in appropriate cases the High Court can entertain the writ petition filed even without exhausting the alternative statutory remedies. It was also contended by Mr. Murthy that simply because in the amended provisions of Sub-section (2) of Section 80 of the Code of Civil Procedure, the civil Court is empowered to permit the institution of the suit and grant appropriate interim order in urgency without serving the statutory notice on the respondent authorities, it cannot be said that the Legislature ought to have incorporated similar provision in Section 401 of the Act also. Shri V.V.S. Murthy would alternatively contend that an intending plaintiff has a remedy to institute a claim by issuing a notice and filing an application seeking temporary orders such as temporary injunction or temporary stay by invoking inherent power of the civil Court under Section 151 of the CPC enclosing a copy of the intended plaint to be registered as a suit upon the expiry of statutory period of notice. This submission of the Deputy Advocate General is based on a judgment of the Division Bench of Madhya Pradesh High Court in the case of

Ram Krishna Parashar Vs. Chironji Lal Vaishya and others[5]. It was also contended that simply because provisions have been enacted in sub-Section (3) of Section 319 of the Municipalities Act exempting institution of suit from embargo contained in sub-Section (1) thereof, it cannot be said that similar provisions should have been enacted in Section 401 of the Act also. Mr. Murthy would contend that the constitutional validity of a law made by a competent Legislature could be attacked only on two grounds stated by the three-Judge Bench of the Supreme Court in the case of **State of A.P. and others Vs. Mc.dowell & Co. and others**[6] and not on any other ground and that judgment holds the field as on today.

(10) Mr. H.B. Agrawal, Sr. Advocate, appearing for the Raipur Municipal Corporation would adopt the arguments of Mr. Murthy.

(11) Having heard the learned counsel for the parties, the only question that arises for our decision is whether the petitioners have shown any constitutional limitation or infirmity to invalidate the impugned provisions of Section 401 of the Act.

(12) The Constitution of India has distributed legislative power between the Centre and the States. The three lists of Seventh Schedule of the Constitution of India do this job. List-I (Union List) enumerates the matters in respect of which the Parliament has the exclusive power to make the laws; List-II (State List) contains the legislative fields reserved for State Legislatures and List-III (Concurrent List) lays down the items on which both the Parliament and the State Legislatures can make the laws (with overriding effect over the law passed by the Parliament). Clause (2)

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5. 1977 JLJ 184
6. (1996) 3 SCC 709

of Article 13 of the Constitution of India mandates that the State shall not make any law which takes away or abridges the rights conferred by Part-III of the Constitution and any law made in contravention of that clause shall, to the extent of the contravention, be void. Therefore, it becomes the duty of the Constitutional Court to declare a law enacted by the Parliament or State Legislature as unconstitutional when they have assumed to enact a law which is void, either for want of Constitutional power to enact it, or because the Constitutional forms or conditions have not been observed, or where the law infringes the fundamental rights enshrined and guaranteed in Part-III of the Constitution or any other substantive Constitutional provisions.

(13) It needs to be noticed, at the threshold, that the presumption is always in favour of constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles and limits, whether it is a pre-constitutional or post-constitutional law. This position is well settled by the Judgments of the Apex Court in **Chiranjit Lal Vs. Union of India**[7] and **Madhu Limaye Vs. Sub-Divisional Magistrate**[8]. In **Cf Rao Bahadur VS. State of U.P.**[9], the Supreme Court held that the burden of providing all the facts which are requisite for the constitutional invalidity is upon the person who challenges the same. However, it is not to state that by reason of the presumption in considering the validity of the impugned law, the Court will be restricted to

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7. (1950) SCR 869
8. AIR 1971 SC 2486
9. (1953) SCR 1188

the pleadings only. The Court would be free to satisfy itself whether under any provision of the Constitution the impugned law can be sustained having due regard to the circumstances in which such law was enacted, as held by the Supreme Court in **Burarkar Coal Co. Vs. Union of India**[10] and **Hamdard Dawakhana Vs. Union of India**[11]. For the same reason the Court should, if possible make such a progressive and/or narrow construction of the impugned statute as would sustain its constitutional validity, as opined by the Supreme Court in **Sunil Vs. Delhi Admn.**[12]. The Supreme Court in **Naresh Vs. State of Maharashtra**[13] has opined that the Court should not cover grounds or make observations on points not directly involved in the proceedings, thereby meaning that unless a point arises for consideration and decision out of the pleadings of the parties, the Court shall not express its opinion on such point. It is well settled by the judgments of the Supreme Court in **Diamond Sugar Mills Vs. State of U.P.**[14], **Navinchandra Vs. Commissioner of Income Tax**[15] and in **Peerless Vs. R.B.I.**[16] that when the vires of an enactment is challenged, and there is any difficulty in ascertaining the limits of a Legislature's power, the difficulty must be resolved, so far as possible, in favour of the legislative body, putting the most liberal construction upon the relevant legislative entry so that it may have the widest amplitude, and looking at the substance of the Legislation.

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10. AIR 1961 SC 954
11. 1960 (2) SCR 671
12. AIR 1978 SC 1675
13. AIR 1967 SC 1
14. AIR 1962 SC 652
15. 1955 (1) SCR 829
16. AIR 1992 SC 1033

(14) In India, any law to be valid has to satisfy the requirements of constitutional limitations contained in the Constitution. The first such requirement is that it should be passed by the competent Legislature, that is to say, the subject matter of the Law should belong to that Legislature according to the distribution of legislative powers between the Union of India and the States. Secondly, the law should not infringe the fundamental rights guaranteed in Part-III of the Constitution of India or any other substantive constitutional provisions. In **State of A.P. Vs. Mc. Dowell and Co.** (Supra), the Supreme Court has opined that except the above two grounds, there is no third ground on the basis of which the law made by the competent Legislature can be invalidated and that the ground of invalidation must necessarily fall within the four corners of the aforementioned two grounds. Essentially, the question of constitutionality is always a question of power. Shri B.P. Sharma, learned counsel for the petitioners, however, contended that the correctness of the judgment of three-Judge Bench in the case of **State of Andhra Pradesh Vs. Mc. Dowell & Company** (Supra) was doubted subsequently by another three-Judge Bench of the Supreme Court in the case of **Subramanian Swamy Vs. Director, CBI & Others**[17] and therefore, the decision of the apex Court in Mc. Dowell & Company (Supra) is no longer good law. We have carefully read the judgment of the Supreme Court in the case of **Subramanian Swamy Vs. Director, CBI & Others** (Supra) and we should state that the submission of Shri B.P. Sharma is not correct. The

17. (2005) SCC 317

Supreme Court having noticed the contentions and counter-contentions made by the learned counsel for the parties in that case in paras 4, 5 & 7 and without expressing any opinion on those contentions has referred the case to the Larger Bench. None of the observations made by Their Lordships of the Supreme Court in the said case would even remotely indicate that Their Lordships disagreed with the law declared in the case of **Mc. Dowell & Company** (Supra).

(15) The Supreme Court in the case of **Mc. Dowell & Company** (Supra), in para 43 of the judgment, held thus:

> "A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness - concepts of procedural unreasonableness and substantive unreasonableness – concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterized, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection

clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19 (1) it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary** or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. "

(emphasis supplied)

(16) Legislature and Judiciary are co-ordinate organs of the State of equal dignity and status under the constitutional scheme. It is permissible for the Constitutional Courts to declare legislative enactments unconstitutional and void in some cases, but, not because the judicial power is superior in degree or dignity to the legislative. The Court while declaring the law as invalid or unconstitutional is only enforcing the legislative will and the limits imposed by the Constitution on the law-making bodies. No Court can declare a statute unconstitutional and void, solely on the ground of unjust and harsh provisions, or because it is supposed to violate some natural, social, political or economic rights of the citizen, unless it can be shown that such injustice is, infact, prohibited or such rights guaranteed or protected by the Constitution. Strictly speaking, the Courts are not guardians of all kinds of rights of the people of the State, unless those rights are secured and protected by some constitutional provision which comes within the judicial cognizance.

(17) In **'A Treatise on the Constitutional Limitations** by **Thomas M.Cooley'**, it is stated that the Court cannot run a race of opinions upon points of right, reason and expediency with the law -making

power, and that any legislative act which does not encroach upon the power apportioned to the other organs of the State, being *prima facie* valid, must be enforced, unless restrictions upon the legislative power can be pointed out in the Constitution itself, and the case shown to come within them. In the same Treatise, it is also stated that the Courts are not at liberty to declare statutes void because of their apparent injustice and impolicy, neither can they do so because they appear to the minds of the Judges to violate fundamental rights of republican Government, unless it shall be that those rights are placed beyond legislative encroachment by the Constitution nor are the Courts at liberty to declare an enactment unconstitutional, because, in their opinion, it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words or discernible from the context. It is not permissible to limit the legislative power of the Legislatures by judicial interposition, except so far as the expressed words a written Constitution gives that authority to the Court. Further, in the same Treatise, it is aptly stated that the law-making power of the State recognises no restraints, and is bound by none except such as or imposed by the Constitution itself placing reliance on the opinion handed down in **Sill Vs. Village of Corning, 15 NY 303**.

(18) In the premise of the above principles governing the review of the constitutional validity of a statute law, let us proceed to examine the contentions raised before us. Sub-section (1) of Section 401 of the Act reads as follows: -

> "**401. Notice, limitation and tender of amends in suit against Corporation, etc**.:- (1) No suit shall be instituted against the Corporation, the Mayor-in-Council, or any Corporation officer or servant, or any person

acting under the direction of the Corporation, the Mayor-in-Council or any municipal officer or servant, in respect of any act done or purporting to have been done in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act or any rule or byelaw made thereunder until the expiration of one month next after notice in writing has been delivered or left at the chief Corporation office or at the residence of such officer, servant or person standing with adequate particulars,-

(a) the cause of action;

(b) the name and residence of the intending plaintiff and of his advocate, pleader or agent, if any, for the purpose of the suit; and

(c) the relief which he claims."

Provisions of Sub-section (1) of the Act are substantially similar to the provisions of Sub-section (1) of Section 80 of the Code of Civil Procedure before its amendment by Act No.104 of 1976 with effect from 01/02/1977. There is a lot of case law highlighting the objects of the notice required under Sub-section (1) of Section 80 C.P.C. before and after its amendment by amendment Act No.104 of 1976. As held by the Supreme Court in **Raghunath Das Vs. Union of India**[18], **State of Punjab Vs. Geeta Iron and Brass Works**[19] and in a recent judgment in **Salem Advocate Bar Association, Tamil Nadu Vs. Union of India** (Supra)[2], the object of the notice required under Sub-section (1) of Section 80 CPC before and after its amendment is to give the Government or the public officer concerned, an opportunity to reconsider legal position and to make

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18. AIR 1969 SC 674
19, AIR 1978 SC 1608

amends or settle the claim, if so advised, without litigation. To the similar effect are the decisions of various High Courts, for instance, Patna High Court in **Province of Bihar vs. Kamakshya Narain Singh**[20] Madras High Court in **Secretary of State Vs. Perumal**[21]; Calcutta High Court in **Shahebzadee Vs. Ferguson**[22], **Manindra Vs. Secretary of State**[23], **Bhuban Mohini Vs. Biraj**[24]; Bombay High Court in **Secretary of State Vs. Gulam Rasul**[25], **Kashinath Vs. Nawab Alam**[26], Allahabad High Court in **Uttar Pradesh Government Vs. Nanhoomal**[27], Nagpur High Court in **Secretary of State Vs. Nagarao**[28]. What is ruled by the Courts with regard to the object of notice required under Sub-section (1) of Section 80 CPC equally applies while dealing with the object of notice required under Sub-section (1) of Section 401 of the Act. The unamended provisions of Sub-section (1) of Section 80 CPC and provisions of Sub-section (1) of Section 401 of the Act are substantially similar in their contents. When a statutory notice is issued to public authorities, it is expected that they must take the notice in all seriousness and they should not sit over it and force the citizen to the vagaries of litigation. They are expected to let the claimant (who has given notice), know, what stand they take, within the statutory period, or, in any case before the plaintiff embarks upon litigation. The whole object of serving a notice under Sub-section (1) of Section 401 of the Act is to give the Corporation and its authorities sufficient warning of the case proposed to be instituted, so that the

20. AIR 1950 Pat 366; 21. (1901) 24 Mad 279 22. (1881) 7 Cal 499
23. (1970) 5 Cal LJ 148 24. AIR 1940 Cal. 1 25. (1916) 40 Bom 392
26. AIR 1935 Bom 229; 27. AIR 1960 All 420 28. AIR 1938 Nag. 415

Corporation and its authorities (if they so wish) can settle the claim without litigation or afford restitution without recourse to court of law. It needs to be noticed that Sub-section (1) of Section 401 of the Act has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Corporation and its authorities, the Corporation or its authorities or the officer concerned is afforded an opportunity to scrutinize the claim and if it be found a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person who has issued the notice to institute the suit involving considerable expenditure and delay. The public purpose underlying the provisions of Sub-section (1) of Section 401 of the Act, is advancement of justice and securing of public good by avoidance of unnecessary and avoidable litigation and therefore, such a provision cannot be condemned as arbitrary or irrational.

(19) The Supreme Court in **Salem Advocate Bar Association , Tamil Nadu Vs. Union of India** (supra)[2] dealing with the object of notice required under Sub-section (1) of Section 80 CPC has observed thus:

> "**40**. Section 80(1) of the Code requires prior notice of two months to be served on the Government as a condition for filing a suit except when there is urgency for interim order in which case the Court may not insist on the rigid rule of prior notice. The two month's period has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying objects is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Similar

provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice is a condition precedent for filing of suit and prescribed period therefore, it is not only necessary for the Governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, government departments or statutory authorities are defendants in large number of suits pending in various courts in the country. Judicial notice can be taken of the fact that in large number of cases either the notice is not replied or in few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.

41. These provisions caste an implied duty on all concerned Governments and States and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, we direct all concerned

Governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him.

(20) The language of Sub-section (1) of Section 401 of the Act is express, explicit and mandatory and it admits no implication or exception, therefore, it is the plain duty of the court to give effect to it and considerations of hardship will not be a legitimate ground for not faithfully implementing the mandate of the legislature. In opining so, we are fortified by the decision of the Supreme Court in the case of **Bihari Choudhary Vs. State of Bihar**[29], dealing with the mandate of the provisions of Sub-section (1) of Section 80 CPC.

(21) At this juncture itself, it is appropriate to notice that there was, at one time, a conflict of decisions among the High Courts that

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29. AIR 1984 SC 1043 = (1984) 1 SCC 627

whether the provisions of unamended Sub-section (1) of Section 80 CPC applied to suits for perpetual injunction. That conflict was resolved by the Privy Council in **Bhagchand Vs. Secretary of State**[30], approving the judgments of Calcutta High Court in **Secretary of State Vs. Rajlucki**[31], **Dakshina Ranjan Vs. Omkar Chand**[32], Madras High Court in **Secretary of State Vs. Kalekhan**[33], **Koti Reddi Vs. Subbiah**[34], and Allahabad High Court in **Bachchu Vs. Secretary of State**[35], **Abdul Rahim Vs. Abdul Rahman**[36], that sub-section (1) of Section 80 CPC and the corresponding Section 424 of the previous Codes should be strictly complied with and that they applied to all forms of action and all kinds of relief. The above decision of the privy Council overruled the decision of the Bombay High Court in **Secretary of State Vs. Gajanan**[37], **Naginlal Vs. Official Assignee**[38], and **Secretary of State Vs. Gulam Rasul**[39], that no notice was necessary in a suit for injunction against a public officer or against the Secretary of State when the act to be restrained against might occasion serious or irreparable damage. The Privy Council speaking through **Viscount Summer** observed thus:

> "To argue as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while s 80 is a mere procedure, is fallacious, for s 80 imposes a statutory and unqualified obligation upon the court. So, too, the contention that the 'act purporting to be done by the collector in his official capacity, in respect a which' the suit was begin, was his threatened enforcement of payment is

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30. AIR 1927 PC 176 31. (1898) 25 Cal 239
32. (1924) 50Cal 992 = AIR 1924 Cal 145
33. (1914) 37 Mad 113 34. (1918) 41 Mad 792
35. (1902) 25 All 187 36. (1924) 46 All 884 = AIR 1924 All 851
37. (1911) 35 Bom 362 38. (1912) 37 Bom 243
39. (1916) 40 Bom 392

> fallacious also, since the illegality, if any, is in the order for recovery of the tax. If that was valid, there was nothing to be restrained. hence thought the act to be restrained is something apprehended in the future, the act alone 'in respect of which 'the suit lies, if at all, is the order already completed and issued."

(22) The above discussion would go to show that the requirement of issuing notice to the Corporation, its authorities and officers, as the case may be, before instituting the suit is based on a laudable public policy, which could not be condemned as arbitrary or irrational on the touchstone of Article 14 postulates. Similarly, the impugned provision cannot be condemned as arbitrary or unreasonable solely on the ground that on certain occasions it may result in hardship or injury to the plaintiff. We may take judicial notice of the fact that the implementation of any law may in certain circumstances result in hardship or inconvenience or disadvantage or loss to a party, but, that circumstance itself is not a permissible ground to annul a law as unconstitutional, because law deals with normalcy and not abnormalcy, ordinary things and events and not extraordinary things and events. Be that as it may, there is no need for us to dilute on this aspect further, because, we are of the considered opinion that a litigant in an extreme urgency has alternative remedies to protect his property against any action of the Corporation and its authorities as provided by the law. It is not as if a litigant is left with no legal remedies in extreme urgency simply because he cannot institute the suit before the Civil Court and obtain an urgent interim order without issuing notice to the Corporation and its authorities and without waiting for a period of one month. It needs to be noticed that giving a notice under Sub-section (1) of

section 401 of the Act does not preclude the party from taking proceedings, other than suit, if they are permissible under the law. In other words, the bar contained in Sub-section (1) is not a bar which is applicable for initiation of all other legal proceedings before different Courts and judicial fora. Under Article 226 of the Constitution, every High Court shall have powers, throughout the territory in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari* for the enforcement of any of the rights conferred by Part-III of the Constitution of India and for any other purpose. It is needless to state that every action of State or its instrumentality or any other body which could be regarded as "State" within the meaning of Article 12 of the Constitution of India, which is illegal or made in-contravention of the prescribed procedure, unreasonable, irrational or malafide is open to judicial review. Every executive or administrative action of the State or other statutory or public bodies, legally treated to be "authority", which is violative of the fundamental rights or any other right or any statute is open to judicial review. Remedies are available in cases of tort also. Such action is subject to judicial review even if it pertains to the contractual field. Article 226 confers power to issue writs, directions or orders for the enforcement of any of the rights conferred by Part-III as well as for any other purposes. Article 226 confers on all the High Courts very wide powers in the matter of issuing writs and orders. The limitations imposed by the Legislature in instituting the suit against the Corporation and its authorities in terms of Sub-section (1) of Section 401 of the Act is not applicable while moving an application under

Article 226 before the High Court for legal remedies. Furthermore, the right to move the Supreme Court for any directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the rights conferred by Part-III of the Constitution of India itself is a fundamental right guaranteed under Article 32 of the Constitution. Therefore, in a case where the plaintiff's fundamental rights are violated by action of the Corporation or its authorities or officers it is open for the plaintiff to move the Supreme Court under Article 32 to enforce his fundamental rights. Thus, it is quite clear that an application under Article 226 before the High Court complaining of infringement of the fundamental rights or any other constitutional right or any other right or an application under Article 32 of the Constitution before the Supreme Court complaining of infringement of fundamental rights guaranteed in Part-III of the Constitution, is not barred on the ground that he has an alternative remedy under Section 401 of the Act by way of suit. It is well settled that where the High Court is of the opinion that in the facts and circumstances of the case the remedy provided under the statute is inadequate and not effective it could step-in under Article 226 of the Constitution and entertain an application notwithstanding the fact that the person has approached the High Court without exhausting the alternative statutory remedies. In this regard we may also cite the judgment of Himachal Pradesh High Court in the case of **Shiv Dutt and another Vs. State of Himachal Pradesh and another**[40]. In that case it was held that an application under Article 226 complaining of infringement of the right of the petitioner therein to certain properties as contravening Article 19 of the Constitution is not barred on the ground that he had given a notice of suit as required under Sub-

section (1) of Section 80 CPC. It also needs to be noticed that mere absence of corrective machinery within the Corporation or mere absence of power in the civil Court to grant interim order in urgent situations immediately after a cause of action arises for a litigant to proceed against the Corporation or its authorities for legal remedies without serving the notice required under sub-Section (1) of Section 401 of the Act on the Corporation and its authorities, that itself would not make the impugned provision unreasonable or arbitrary much less would render the impugned provision invalid. The lack of jurisdiction in the civil Court to grant urgent interim orders before issuing the notice required under Section 401 (1) of the Act and the notice period expires, is not of much consequence especially when it is open to an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The remedy of judicial review under Article 226 is an adequate protection against an arbitrary action of the Corporation and its authorities in exercise of their powers under the Act. This position should alleviate the apprehension of the petitioners as highlighted by their counsel, Shri B.P. Sharma quite vociferously.

(23) Furthermore, it needs to be noticed that a Division Bench of the Madhya Pradesh High Court in the case of **Ram Krishna Parashar Vs. Chironji Lal Vaishya and others** (supra) has opined that where the

40. AIR 1953 Him-P 95

period of notice under Section 80 of the CPC has not expired, an intending plaintiff can file a substantive application under Section 151 of the CPC invoking inherent powers of the Court praying for grant of a temporary injunction and the Civil Court acting on such application can grant a temporary injunction having regard to the inherent powers saved by Section 151 of the CPC and that such an order will only be operative till the party concerned is able to file a suit and is able to obtain a temporary injunction from the Court in the suit itself. In other words, as per the above judgment of the Madhya Pradesh High Court, an intending plaintiff has a remedy to institute a claim by issuing a notice and filing an application seeking temporary injunction and making a prayer to the Court to exercise inherent power under Section 151 enclosing a copy of an intended plaint to be registered as a suit upon expiry of statutory period of notice and in that event the Civil Court acting on such an application, in appropriate cases, can grant temporary injunction in exercise of its inherent power saved by Section 151 of the CPC. In the course of hearing, we were told by the learned counsel for the parties that the judgment in the case of **Rama Krishna Parashar Vs. Chironji Lal Vaishya and others** (supra) has become final and it holds the field.

(24) In view of the above discussion, the first contention of Mr. B.P. Sharma, learned counsel for the petitioners, which is grounded on the assumption that in view of the bar contained in Sub-section (1) of Section 401 of the Act in the matter of instituting suit against the Corporation and its authorities, the aggrieved persons are left with no legal remedies, is not acceptable to us, for the simple reason the aggrieved parties in extreme urgency and exigency can seek appropriate orders from

the High Court under article 226 of the Constitution or approaching the Civil Court itself by filing a substantive application under Section 151 of the C.P.C. invoking inherent power of the Civil Court as ruled by the Division Bench of the Madhya Pradesh High Court in the case of **Ram Krishna Parashar Vs. Chironji Lal Vaishya and others** (supra) or where the Fundamental Rights are violated by moving the Supreme Court under Article 32 of the Constitution.

(25) This takes us to the next contention of Mr. Sharma that since Sub-section (1) of Section 401 of the Act does not contain special provision for institution of the suit under Section 54 of the Specific Relief Act, 1877 exempting such institution from embargo as has been done in Sub-section (1) of Section 319 of the Madhya Pradesh Municipalities Act, 1961 and since no power has been conferred on the Civil Court to grant urgent immediate relief without serving any notice as required by Sub-section (2) of Section 80 C.P.C. as provided under Sub-section (2) thereof, the impugned provision is liable to be condemned as unconstitutional being *ex facie* discriminatory.

(26) In **State of Bombay Vs. Balsara F.N.**[41], the Supreme Court held that mere production of inequality is not enough to invalidate a law. In **Ammeroonissa Begum Vs. Mehbood Begum**[42], **Babulal Amthalal Mehta Vs. Collector of Customs, Calcutta**[43], **Gopi Chand Vs. Delhi Administration**[44], the Supreme Court held that differential treatment

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41. AIR 1951 S.C. 318 42. A.I.R. 1953 S.C. 91
43. AIR 1957 S.C. 877 44. AIR 1957 S.C. 609

denies equal protection only when there is no reasonable basis for the differentiation. It is well settled that if a law deals equally with members of a 'well defined class' of persons or things, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. It is for Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render the legislation which has been enacted in any manner discriminatory and violative of Article 14. What Article 14 prohibits is class legislation and not reasonable classification for the purpose of legislation which Legislature takes care to reasonably classify persons for legislative purpose and if it deals clearly with all persons belonging to a '*well defined class*', it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons or things. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. Article 14 does not insist that legislative classification should be scientifically perfect or logically complete. The Court would not interfere unless the classification results in apparent inequality.

(27) When a law is challenged as denying equal protection, the question for determination by the Court is not whether it has resulted in inequality, but whether there is some difference, which bears a just and reasonable relation to the object of legislation. Mere differentiation or inequality of treatment or inequality of burden does not per se amount to discrimination within the inhibition of the equal protection clause. It is

necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the Legislature has in view.

(28) It needs to be noticed that the persons who live within the territorial jurisdiction of a Municipality and the persons who live within the territorial jurisdiction of a Corporation could not be regarded as the persons belonging to a same class or category for the purposes of Article 14 of the Constitution of India. A Corporation is undeniably a larger and complex as well as more urban entity than a Municipality. The wisdom of the Legislature in not enacting a provision similar to Sub-section (3) of Section 319 of the Madhya Pradesh Municipalities Act, 1961 in the body of Section 401 of the Act could not be questioned by this Court. Similarly, there is a distinct difference in legal process envisaged under Section 80 of the C.P.C. and Section 401 of the Act. Under C.P.C., any person can institute a suit of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred against any other person, natural or juridical, whereas Section 401 of the Act envisages institution of a suit only against the Corporation and its authorities. In modern times, the Corporations are established to provide not only public utility service but also to perform many functions traditionally belonging to and performed by sovereign State. Here again, the wisdom of the Legislature in not enacting the provisions of the nature enacted in sub-Section (1) of Section 80 of the C.P.C. empowering the Civil Court to grant urgent interim orders without insisting issuance of service of notice on the defendant authorities in Section 401 of the Act, could not be questioned by the Court. Therefore, the contention of Mr. B.P. Sharma that the impugned

enactment is a piece of discriminatory legislation, is not acceptable to us and the same is rejected.

(29) Lastly, the contention of Mr. B.P. Sharma that in view of the embargo contained in Sub-section (1) of Section 401 of the Act, the right of a citizen guaranteed under Article 300-A of the Constitution to protect his property is violated, is required to be noticed only to be rejected in view of what we have stated supra. What Article 300-A guarantees is that no person shall be deprived of his property save by the authority of law. The 'deprivation' is to be distinguished from 'restriction' of the rights of ownership. Simply because sub-Section (1) of Section 401 of the Act places an embargo on a person that he cannot institute a suit without issuing notice to the Corporation and its authorities, it cannot be said that that embargo tends to deprive the property of the person. Furthermore, it needs to be noticed that a person could be deprived of his property by authority of law in terms of Article 300-A itself. If a person could be deprived of his property under the provisions of the Act for valid reasons or grounds stated therein, such person should not be heard to say that he is deprived of his property without authority of law.

(30) In the result and for the foregoing reasons, we dismiss the writ petitions and uphold the constitutional validity of the impugned provision of Section 401 of the Act, however, with no order as to costs.

(31) We notice from the order-sheets, this Court by passing interim orders has maintained status quo with regard to the subject properties, thereby preventing the demolition of the subject properties all these months. In that view of the matter, we direct that interim orders

made by this Court in these writ petitions shall be in operation for a period of six weeks from today. We, however, make it clear that after the expiry of six weeks period, it is open for the Corporation and its authorities to take appropriate legal steps to demolish the subject properties, if there is any legal justification to do so.

Sd/-
Chief Justice

Sd/-
Satish K. Agnihotri
Judge